U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 22 November 2004

Case No.: 2003-LHC-1738

OWCP No.: 5-58485

In the Matter of:

WESLEY A. WIGGINS,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING,
Employer.

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

Appearances:

For the Claimant:
Matthew Kraft, Esq.

For the Respondent:
Benjamin Mason, Esq.

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers Compensation Act ("the Act"), as amended, 33 U.S.C. Section 901 *et seq*. Claimant, Wesley Wiggins, sought compensation for an injury sustained in the course of working for Newport News Shipbuilding and Dry Dock Company ("Employer"). A formal hearing was held in this case on June 28, 2004, in Newport News, Virginia. Claimant testified before the court and submitted exhibits 1 through 9; Employer offered exhibits 1 through 17.[1] All exhibits were admitted into evidence without objection. Both parties filed post-hearing briefs. The findings

[1] The following abbreviations will be used as citations to the record:
EX – Employer's Exhibits
CX – Claimant's Exhibits
TR – Transcript

and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

PROCEDURAL HISTORY

Administrative Law Judge Fletcher E. Campbell, by Decision and Order Awarding Benefits, dated April 12, 1996, concluded that Claimant had been injured on June 11, 1986 in the course of his employment at Newport News Shipbuilding and Dry Dock Company, that Claimant's weekly wage was $524.51 and that he was entitled to an award of benefits for temporary total and partial disability as well as a non-scheduled permanent disability. Judge Campbell, effectuating the parties' stipulations, awarded Claimant, *inter alia*, benefits for his temporary total, temporary partial, and permanent partial disability in the amount of $15,707.05, as well as ongoing permanent partial disability benefits from September 3, 1992 through the present and continuing at the weekly rate of $43.01.[2]

Claimant filed a Motion for Modification alleging a change in his economic condition. Specifically, Claimant argues that he has suffered an increased loss of wage earning capacity, and is therefore entitled to an increase in ongoing benefits based on that increased loss. Employer opposes Claimant's Motion and has in turn filed its own Motion for Modification. Employer alleges, similarly, a change in Claimant's economic condition; however, Employer argues that Claimant's post-injury wage earning capacity has substantially increased, thus eliminating Claimant's need for an ongoing award. Additionally, Claimant argues that if his request is denied and Employer's granted, he is entitled to a *de minimis* award.

ISSUES

1. Is Claimant entitled to an additional benefit award for the period of March 4, 1998 through December 31, 2001?

2. Is Claimant entitled to an additional benefit award from January 1, 2002 and continuing?

3. If Claimant is not entitled to an additional ongoing benefit award beginning January 1, 2002, is Claimant entitled, in the alterative, to a *de minimis* award?

4. May Claimant's permanent partial disability benefit award be terminated?

[2] Additionally, Judge Campbell denied Employer's claim for Section 8(f) relief in his April 12, 1996 decision. CX-6. Upon Employer's Motion for Reconsideration, however, Judge Campbell amended his Decision and Order and granted § 8(f) relief to Employer. CX-7. Subsequently, the Benefits Review Board vacated Judge Campbell's findings on the applicability of Section 8(f)(3), and remanded the case for further consideration. CX-8. On remand, Judge Campbell denied Employer's claim for Section 8(f) relief, finding that Employer's claim, although otherwise meritorious, was barred by the absolute defense. CX-9.

STIPULATIONS

Employer and Claimant stipulated to, and I find, the following facts:

1. On June 11, 1986, Claimant was in the employ of Employer and that the liability of Employer for payment of workers' compensation benefits was insured by the Self-Insured Employer.

2. On June 11, 1986, Claimant sustained a work related injury to his back.

3. Written notice of the injury was not given within thirty days to Employer but Employer had knowledge of the injury and has not been prejudiced by lack of such written notice.

4. Employer furnished Claimant with medical services in accordance with the provisions of Section 7 of the LHWCA.

5. The average weekly wage of Claimant at the time of his injury was $524.51.

6. As a result of Claimant's back injury, he has been permanently and partially disabled from June 5, 1992 through at least December 31, 2001 due to a loss of overtime. Claimant's permanent partial disability benefits have been in the amount of $43.01 per week.

SUMMARY OF THE EVIDENCE

Testimony of Wesley Wiggins

Claimant was hired by Employer in October 1974 as a rigger. Riggers work throughout the shipyard on various crews and under various foremen. Tr. 26. Prior to his injury in 1986, Claimant worked as a rigger, and worked mostly aboard various naval ships. Tr. 19. Claimant was offered and accepted overtime prior to his injury. Tr. 20. At that time he was hired, Claimant was a co-worker with Ronnie Batten, Mack Lassiter, Zollie Outlaw and Henry Novelle, all of whom were also riggers. Claimant stated that of these co-workers, only Mr. Batten most closely resembled Claimant in terms of training and qualifications at the time of his injury. Tr. 18. Of these employees, Mr. Batten is the only one who sometimes worked on the same crew as Claimant. Tr. 25. Even then, Mr. Batten worked for a different foreman. Tr. 25. At the time of his injury, none of these employees worked on Claimant's crew. Tr. 25. Following his injury, Claimant began working steadily as a forklift driver.[3] Tr. 19. Claimant has received a permanent partial disability payment since his injury in the amount of $43.01.[4]

[3] Claimant also drove a forklift "off and on" prior to his injury. Tr. 28.

[4] This payment is based on Claimant's hourly overtime wage of $17.25 multiplied by 3.74 hours, which represents the amount of overtime that Claimant worked on average in the year prior to his injury. $43.01 is two-thirds of $64.51.

Prior to his injury, Claimant was qualified to do nuclear and radiation control ("radcon") work. He had qualified to do radiation control work by taking a five-day class and had qualified to do nuclear work by taking a one day class. These qualifications allowed Claimant, as a rigger, to work with nuclear pipe. Tr. 27. Claimant testified that Mr. Batten also attended these schools and received radcon and nuclear qualifications, but he was unaware if the other riggers he knew ever attended this school. Tr. 28. Claimant stated that once an employee is nuclear and radcon qualified, he has more opportunities to work overtime.[5] Tr. 33. However, Claimant never actually performed nuclear work prior to his injury. Tr. 33, 48.

Claimant was not offered significant overtime from the time of his injury through 2001. Tr. 20. In 2002, Claimant's department, the Modular Outfit Facility (MOF) began offering overtime for forklift drivers. Tr. 21. Claimant worked 190.6 hours of overtime in 2002, 530.4 hours in 2003, and 229 in the first six months of 2004.[6] Tr. 41.

Claimant acknowledged that the overtime assigned to any particular area of the shipyard varies. Tr. 26. Claimant heard other employees say that Mr. Lassiter worked more overtime hours than Claimant. Tr. 23. According to Claimant, from 1998 through 2001, Mr. Batten was offered and worked overtime in some of the same places that Claimant worked prior to his injury. Tr. 21. For example, Mr. Batten worked in the shipyard or on the piers, where Claimant had also worked prior to his injury; Mr. Batten also worked overtime in places where Claimant had never worked prior to his injury, such as the nuclear facility. Claimant stated that Mr. Batten is currently working at the 1011 dry dock.[7]

Claimant observed that Mr. Outlaw worked significant overtime in 1998; Claimant then lost contact with Mr. Outlaw beginning in 1999, but believes that Mr. Outlaw may have been injured. Tr. 22-23. Claimant also stated that Mr. Novelle and Mr. Lassiter worked significant overtime during this period. Tr. 23. Like Claimant, Mr. Lassiter works inside the MOF building, however, he does not work for the same foreman as does Claimant. Tr. 29. Mr. Novelle works inside Building 13, which is located next to the MOF building. Tr. 29.

Claimant noted that he suffers from degenerative disks in his back, a condition which worsens as he ages. Claimant still treats for this condition on occasion with Dr. Nichols. Tr. 24.

Testimony of Andrew Bonney

Mr. Bonney, Claimant's foreman since July 2002 and an employee at Newport News Shipbuilding for 22 years, worked with Claimant prior to becoming a foreman. During that time,

[5] More overtime work is available for nuclear qualified employees because the gravity of nuclear work requires that it is slowly and meticulously performed – which equates into more man hours being spent on a given project. Tr. 32-33.

[6] Claimant worked 229 hours in 2004 as of the date of the hearing, June 28, 2004.

[7] Claimant's current foreman, Mr. Bonney, concurred with Claimant that Mr. Batten has worked overtime at the 1011 dry dock on nuclear carrier refueling since 1998. Tr. 43.

he and Claimant worked new construction together, which involved putting together submarines. Tr. 37.

Mr. Bonney stated that his crew is currently performing new construction work for the submarines. Tr. 40. Mr. Bonney explained that it is possible for his crew to work alongside another crew which is doing other work on the same project. For example, he stated that his crew has employees who operate cranes and forklifts, whereas another foreman and his crew, working on the same project, may only have employees working as riggers or stage builders. Tr. 38. Mr. Bonney stated that overtime is offered by general foreman areas. Tr. 44. To determine overtime needs, the foremen are told how many hours are needed for the project, and then each foreman decides how many employees he will need to meet that schedule. Tr. 38. Mr. Bonney's crew has been working overtime continuously since July 2002. The majority of this overtime is worked on the weekends, but occasionally overtime is worked after the regular workday. Tr. 40. Based on conversations with his general foreman, Mr. Bonney believes that overtime will be available to his crew for the foreseeable future. Tr. 41-42.

Mr. Bonney explained that riggers are moved around in the yard depending on manning needs. Tr. 44. Therefore, Mr. Bonney could not say whether Claimant, had he not been injured and continued to work as a rigger, would have continued to work under the same foreman for whom Mr. Batten has worked these last 18 years.[8] Tr. 45-46. As he explained, "you [an employee] just end up where you end up." Tr. 45. Mr. Bonney stated that Mr. Batten is currently working overtime at the 1011 dry dock on the carrier refueling. Tr. 43. This work requires both nuclear and radcon certification. Tr. 43.

DISCUSSION

Section 22 of the Act states, in essence, that any party-in-interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. 33 U.S.C. 922.[9] Section 22 provides the only means for changing otherwise final decisions. *See Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291 (1995). A request for modification need not be formal. It simply must be a writing or verbal notice which indicates a clear intention to seek further compensation. *I.T.O. Corp. Of Virginia v. Pettus*, 73 F.3d 523, 527 (4th Cir. 1996), *cert. denied*, 519 U.S.807 (1996). The party requesting the modification has the burden of showing a change in conditions. *Vasquez v. Continental Maritime*, 23 BRBS 428 (1990).

[8] Mr. Bonney conceded, however, that he is unable to say that Claimant would not have had the same overtime opportunities available to him as Mr. Batten had Claimant not been injured. Tr. 46-47.

[9] Section 22 states, in pertinent part, that an administrative law judge may, ". . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect to claims in Section 19, and in accordance with such section, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U.S.C. 922.

In this case, both Claimant and Employer have timely requested modification of Claimant's current award. Therefore, both parties have the burden of showing a change in conditions and proving their entitlement for a modification. Claimant is seeking an increase in permanent partial disability benefits for the period of March 4, 1998 through December 31, 2001 and for the period of January 1, 2002 through the present and continuing. Tr. 13. Employer argues that Claimant is unable to show a change in condition from 1992 – when he began receiving benefits – through December 2001, and therefore is not entitled to a Section 22 modification. Tr. 14. Specifically, Employer notes that the evidence brought by Claimant showing that other employees worked more overtime in this period is inapplicable. Instead, Employer argues that beginning January 1, 2002, Claimant ceased to suffer a wage earning loss and therefore is no longer entitled to receive his benefits award.

Increased Compensation for March 4, 1998 through December 31, 2001

Claimant contends that he is entitled to increased permanent partial disability benefits for the period of March 4, 1998 through December 31, 2001 based on a comparison between overtime available to and worked by him, and overtime available to and worked by comparable co-workers during that period. Claimant asserts that Mr. Batten, Mr. Lassiter, and Mr. Novell[10] are generally comparable for the purpose of this overtime calculation. Claimant argues that Mr. Batten is most comparable to Claimant in terms of qualifications; in the alternative, Claimant requests that the average of the overtime hours worked by the alleged comparable employees be used as a basis for an additional overtime award. Employer argues that the co-workers named by Claimant are not comparable employees; Employer also asserts that Claimant has failed to show that but for his injury, he would have remained on the same crew as these employees for the last ten years.

Claimant first uses the overtime worked by Mr. Batten as a measure of Claimant's wage-earning capacity loss. The overtime hours worked by Claimant and Mr. Batten in the relevant time period are:

	1998	**1999**	**2000**	**2001**
Wesley Wiggins	0	0	.5	9
Ronnie Batten	629.6	387	214.1	576

Claimant contends that he should receive an additional compensation award for the average hours Mr. Batten worked during this time period, minus any overtime hours worked by Claimant and minus the hours (194.5) for which Claimant already received compensation. The results for each of those years is as such: 435.10 hours in 1998; 192.5 hours in 1999; 19.1 hours in 2000, and 372.5 hours in 2001. The overall average of hours "lost" to Claimant would be 254.91 hours a year, which, at an overtime rate of $17.25 an hour, would entitle Claimant to an additional ward of $56.37 a week.

[10] Although Claimant named Mr. Outlaw as a comparable employee during the hearing, Claimant's post-hearing brief does not use overtime hours worked by Mr. Outlaw as a basis for Claimant's argument. The court attests this omission to Claimant's testimony, in which Claimant stated that he "lost contact" with Mr. Outlaw in 1999, and was unsure of what happened to him [Mr. Outlaw]. Tr. 23.

Alternatively, Claimant argues that an average of the hours worked by Mr. Batten, Mr. Lassiter, and Mr. Novell should serve as a comparison for the purpose of overtime calculation. These gentlemen worked the following overtime hours in the relevant time period:

	1998	**1999**	**2000**	**2001**
Wesley Wiggins	0	0	.5	9
Ronnie Batten	629.6	387	214.1	576
Henry Novell	202.9	155.5	40	83.5
Mack Lassiter	368.8	148.7	214.1	256.5

Claimant offers the same method of calculation as he used for Mr. Batten's overtime hours when calculating the overtime hours worked by multiple employees: the difference between any overtime hours worked by Claimant and minus the hours (194.5) for which Claimant already received compensation and the average of overtime hours worked by these employees each year. These calculations result in Claimant sustaining a loss of 205.93 overtime hours in 1998; 35.9 in 1999; 0 in 2000; and 101.83 in 2001. The average of these hours equals 85.92 hours a year, for which Claimant would receive an additional award in the amount of $28.50 per week.

An award for an unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage earning capacity. In computing a claimant's loss of wage-earning capacity, it is proper to consider a claimant's loss of overtime. *Brown v. Newport News Shipbuilding and Dry Dock Co*., 23 BRBS 110, 112 (1989).

Following Claimant's injury in 1986, the parties stipulated to Claimant's pre-injury average weekly wage. Claimant was able to continue his employment with Employer, albeit in a different position. Claimant's only economic loss was his inability to work overtime following his injury, because overtime was not then available in his position as a forklift driver. As such, the parties agreed that Claimant would be compensated for this loss with an award which represented the average weekly hours of overtime he had worked in the year prior to his injury. This permanent partial disability award, in the amount of $43.01, has compensated Claimant for his loss of overtime continuously since 1992.

Claimant is now trying to modify the agreement between the parties by looking at how many overtime hours "comparable" employees worked during the past six years. The court notes, and finds persuasive, that Claimant has not cited any legal precedent to support his argument that comparable employees should be used to modify his award for his loss of overtime. The method which Claimant proposes as a means to calculate his loss of wage-earning capacity is inconsistent with the Board's method. The proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid at the time of his injury. *Richardson v.*

General Dynamics Corp., 23 BRBS 327 (1990). Using this method, the court finds that Claimant's loss of wage-earning capacity was properly accounted for in his permanent partial disability award. Therefore, the Claimant's argument is without merit and Claimant's request for modification for the period of March 4, 1998 through December 31, 2001 is denied.

Assuming arguendo that Claimant's argument was supported by precedent, the court does not find the employees named by Claimant to be "comparable" for his purpose of calculating wage-earning capacity. Mr. Batten, who Claimant asserted is the most comparable employee, has performed nuclear refueling and other radcon work since March 1998. Although Claimant was qualified to perform this type of work at the time of his injury, the parties stipulated that he never actually performed this type of work. Tr. 48. According to the testimony of Claimant and Mr. Bonney, Mr. Batten first began doing this work in 1998, despite being qualified to perform such work prior to 1986. There is nothing to indicate that Mr. Batten performed nuclear refueling and other radcon work in the period between Claimant's injury and March 1998. Although Claimant was qualified to perform this work, there is nothing in the record that indicates to the court that Claimant, had he not been injured, would have also ended up doing this type of work.[11] As Claimant never performed this type of work, the court does not find that Mr. Batten is a comparable employee for purposes of computing Claimant's wage earning capacity.

The court also finds that Mr. Novell and Mr. Lassiter cannot be considered comparable employees. Neither of these gentlemen were working on Claimant's crew or under the same foreman as Claimant at the time of Claimant's injury. Tr. 25. Mr. Bonney, Claimant's current foreman, testified that there is no way to guarantee that Claimant, had he not suffered his injury, would have worked with or near these employees. Tr. 46. The fact that Mr. Novell, Mr. Batten and Mr. Lassiter are all currently working on different crews supports this statement. Claimant offered no evidence to show that he would have followed in the paths of these gentlemen. Mr. Bonney noted that manning needs at the shipyard often dictate where and to which crew an employee is assigned.

The court does not find that claimant's loss of wage earning capacity has been incorrectly represented using the calculations to which both Claimant and Employer stipulated in 1996. Therefore, the court finds that Claimant has failed to show that he is entitled to an additional benefits award based on the amount of overtime worked by these employees for the period of March 4, 1998 through December 31, 2001. Claimant's request for modification of his award for this period is denied.

[11] For example, if Claimant had shown that all riggers who, at the time of Claimant's injury, were qualified to perform nuclear refueling, eventually were assigned to perform this work (as in the case of Mr. Batten), then perhaps the court would have had a better basis from which to determine comparability. However, the fact that Mr. Batten first performed this type of work many years after he had already received his qualifications suggests to the court that there is little or no correlation between Mr. Batten and Claimant.

January 1, 2002 through the present and continuing

Beginning January 1, 2002, and continuing, Claimant was offered overtime in his position as a forklift driver. Claimant maintains, however, that despite his ability to now work overtime, he continues to suffer a loss of wage-earning capacity due to his injury based upon a comparison between his overtime worked and the overtime worked by his comparable co-workers. For this time period, Claimant again argues that Mr. Batten is most comparable to Claimant in terms of qualifications. In the alternative, Claimant requests that the average of the overtime hours worked by the comparable employees be used as a basis for an additional compensation award.

	2002	**2003**	**2004**[12]
Wesley Wiggins	190.6	530.4	220
Ronnie Batten	1680	1270.5	156

Claimant first computes his annual loss by comparing his overtime hours to those worked by Mr. Batten. Claimant contends that in 2002, he suffered a loss of 1294.9 hours, and in 2003, a loss of 545.6 hours. These figures were reached by subtracting the overtime hours worked by Claimant (190.6 and 530.4, respectively) and the hours for which Claimant has already been compensated (194.5) from the overtime hours worked by Mr. Batten in 2002 and 2003. In 2004, Claimant had already worked more overtime hours than Mr. Batten; thus, Claimant cannot compute an annual loss. The average of overtime hours lost by Claimant for these three years (1294.9 in 2002; 545.6 in 2003; and 0 in 2004) equals 613.5 hours, which would entitle Claimant to an additional compensation rate of $135.68 a week.

Alternatively, Claimant contends that his annual loss can be computed by comparing his overtime hours to those worked by Mr. Batten, Mr. Novell, and Mr. Lassiter.

	2002	**2003**	**2004**
Wesley Wiggins	190.6	530.4	220
Ronnie Batten	1680	1270.5	156
Henry Novell	240.6	259	139
Mack Lassiter	378.5	514.1	185.5
Average of Comparable Employees	733	681.2	6.48
Difference between average hours worked by comparable and employees and hours worked by Mr. Wiggins	542.4	150.8	0
Minus hours for which Mr. Wiggins was already compensated (194.5)	347.9	0	0

[12] Overtime hours worked for 2004 refer to hours worked between January 1, 2004 and June 22, 2004.

The average of overtime hours lost by Claimant for these three years (347.9 in 2002; 0 in 2003; and 0 in 2004) equals 115.97, which would entitle Claimant to an additional compensation rate of $25.65 per week.

Lastly, Claimant argues that even if the figures put forth by Claimant are not utilized as a measure of the loss at issue, the evidence supports an entitlement to at least the rate at which Claimant was previously paid based on the continued general availability of overtime at the shipyard.

Employer argues that since January 1, 2002, Claimant has worked overtime equal to or in excess of the 194.5 hours of overtime which he worked in the year prior to his injury. Specifically, and as noted above, Claimant worked 190.6 hours of overtime in 2002 and 530.4 hours of overtime in 2003. As of June 22, 2004, Claimant had worked 229 hours of overtime, which extrapolated out for the remainder of 2004, equals approximately 450 hours of overtime. Employer notes that Mr. Batten, who Claimant characterizes as the most comparable employee, is working less overtime in 2004 than Claimant. Accordingly, Employer opposes an additional benefits award for Claimant from January 1, 2002 and continuing, and instead requests that Claimant's award for permanent partial disability benefits be terminated, as Claimant no longer suffers from a wage-earning loss.

For the same reasons listed above, the court does not agree with Claimant's request for modification. The court finds no basis on which to justify the use of comparable employees as a measure of Claimant's wage earning loss. Furthermore, the court reiterates that the employees named by Claimant would not be comparable even if the court had a basis for adjusting the agreement between the parties.

The court must now address the merits of Employer's request for modification. The Benefits Review Board has held that a change in economic condition may provide justification for Section 22 modification. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co*., 16 BRBS 282 (1984), *aff'd* 776 F.2d 1225 (4th Cir. 1985). In *Fleetwood*, the Board held that the employer no longer needed to compensate a claimant where the claimant no longer suffered a loss in wage-earning capacity. The Board has upheld a Section 22 modification terminating a claimant's award for loss of overtime upon a finding that claimant no longer suffered a loss of overtime. *Smith v. Newport News Shipbuilding and Dry Dock Co*., BRB No. 96-1004 (1997) (unpublished) (upholding the administrative law judge's finding that employer successfully showed a change in claimant's economic condition where claimant was working more overtime hours than his permanent partial disability award compensated him for).

The court finds that Claimant has steadily worked overtime for the last three years, in amounts equal or greater to the 194.5 hours for which he currently is compensated. Specifically, Claimant worked 190.6 overtime hours in 2002, 560.3 in 2003, and is on track to work approximately 450 overtime hours in 2004. Therefore, he is no longer suffering a wage earning loss. Accordingly, the court finds that Claimant's award in the amount of $43.01 should be terminated.

De Minimis Award

A *de minimis* award is proper where an employee with a proven medical disability presently has no loss of wage-earning capacity, but reasonably expects to incur a loss in wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 U.S. 121, 31 BRBS 54 (1997). The practical effect of a *de minimis* award is that the one-year limitations period for modification is tolled indefinitely, and the claimant may seek modification at any time under Section 8(c)(22) of the Act. In order to obtain a *de minimis* award, there must be a significant potential for a future reduction in the claimant's earning capacity stemming from the current injury. *Id.,* 521 US at 137, 31 BRBS at 61 (requiring a showing that there is a "significant possibility" that a worker's wage-earning capacity will at some future point fall below his pre-injury wages).

The burden of showing a future loss in wage earning capacity is on the proponent of the order; and when the evidence is evenly balanced, the proponent loses. *Rambo II*, 521 U.S. at 138-9, 31 BRBS at 61-62 (citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 270 (1994)). Therefore, in a claim seeking a *de minimis* award, the claimant has the burden of providing evidence establishing that "the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future." *Rambo II, supra*; *see, e.g., Gilliam v. Newport News Shipbuilding & Dry Dock Co*., 35 BRBS 69 (2001) (upholding the ALJ's determination that the claimant did not meet his burden of proof, as he failed to provide any direct statement by claimant's doctor attesting to the significant possibility that he would need surgery and thus miss work or suffer a diminished wage-earning capacity, i.e., suffer future economic harm as a result of his injury).

Claimant contends that to the extent benefits are not awarded him for the period of January 1, 2002 and continuing, he is entitled to the entry of a *de minimis* award. Claimant argues that he suffers from deterioration in his physical condition. Specifically, he argues that his back condition still bothers him, and that he experiences increased pain from the degenerative discs in his back. Although Dr. Nichols' notes reflect Claimant's degenerative disc condition, there is no indication that Claimant's condition will require surgery or will cause him to experience a wage-earning loss. In fact, Dr. Nichols' notes indicate that Claimant's pain is not "bad enough to require surgery." CX -1(n). Dr. Nichols' notes also indicate that Claimant is able to perform his job as a forklift driver. CX-1(k). The court acknowledges that Claimant suffers some discomfort and pain as a result of his injury. However, the medical evidence provided by Claimant, like that in *Gilliam*, *supra*, does not indicate that a significant possibility exists that Claimant will suffer future economic harm as a result of his injury.

Additionally, Claimant argues that his past overtime losses, combined with the fluctuation in overtime, suggest that it is "likewise lucky, or at the very least possible" that he will suffer a future economic loss. Mr. Bonney, Claimant's foreman, testified that he expects overtime for his crew to continue. Furthermore, Claimant's overtime records for the last three years, beginning with 2002, when Claimant was first offered overtime, show a steady availability of overtime equal to, or in excess of the 194.5 overtime hours for which he has steadily received compensation. *Rambo II* requires the proponent of the *de minimis* award to show a "significant possibility" of a future loss of wage earning capacity. Claimant has not met that burden.

Therefore, the court denies Claimant's request for a *de minimis* award on the basis that Claimant has not shown that the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future.

ORDER

1. Claimant's request for an additional compensation award for the period of March 4, 1998 through December 31, 2001 is DENIED;

2. Claimant's request for an additional compensation award for the period of January 1, 2002 through the present and continuing is DENIED;

3. Employer's request for the termination of Claimant's current permanent partial disability award, in the amount of $43.01, is GRANTED; and

4. Claimant's request for a *de minimis* award is DENIED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/JRR